No. 96316-9

SUPREME COURT OF THE STATE OF WASHINGTON

AJI P., et al.,

Appellants,

v.

STATE OF WASHINGTON, et al.,

Respondents

APPELLANTS' OPENING BRIEF

ANDREA K. RODGERS, WSBA #38683
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117
T: (206) 696-2851
andrearodgers42@gmail.com

ANDREW L. WELLE, *Pro Hac Vice*
Law Offices of Andrew L. Welle
1216 Lincoln Street
Eugene, OR 97401
T: (574) 315-5565
andrew.welle@gmail.com

Attorneys for Appellants

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I. INTRODUCTION

This Court should reverse the King County Superior Court's judgment dismissing this case brought by thirteen Washington Youth Appellants (the "Youth") between the ages of 8-18 to enforce their fundamental rights under Washington's Constitution. The Youth allege that Respondents – the State of Washington, Governor Jay Inslee, and six state agencies – despite economically and technologically feasible alternatives, have injured and continue to injure them by creating, operating, and maintaining a fossil fuel-based energy and transportation system that Respondents knew would result in greenhouse gas ("GHG") emissions, dangerous climate change, and resulting widespread harm.

The Youth assert constitutional substantive due process, equal protection, and public trust claims seeking declaratory and injunctive relief to bring Washington's energy and transportation system into constitutional compliance. The Youth also challenge the constitutionality of the dangerous GHG emission targets in RCW 70.235.020. The harms the Youth are personally experiencing, and are projected to get worse, include relocation from their home because of climate-induced sea level rise, denial of their traditional cultural rights to gather shellfish due to warmer ocean temperatures and ocean acidification, and the mental and physical injuries

of hazardous air quality from climate-induced wildfires, are largely undisputed in this case.

The Youth's requested relief does not require this Court to assume the policy-making role of the legislative and executive branches. The Superior Court's conclusion that it lacks jurisdiction to review Respondents' actions for constitutional compliance flouts "the role of the court[s] . . . to police the outer limits of government power . . . ." *McCleary v. State*, 173 Wn.2d 477, 519, 269 P.3d 227 (2012). The Superior Court is without authority to "abdicate [its] duty to interpret and construe" the Washington Constitution. *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 506, 585 P.2d 71 (1978).

II. ASSIGNMENTS OF ERROR

The Youth present the following assignments of error in this appeal:

1. The Superior Court erred by holding that there is no fundamental constitutional right to a healthful and pleasant environment contrary to legislative declaration and applicable law;
2. The Superior Court erred by concluding that the Youth did not raise a cognizable equal protection claim;
3. The Superior Court erred by holding that the Youth's constitutional claims present nonjusticiable political questions;

4. The Superior Court erred by dismissing all of the Youth's other constitutional claims with no legal explanation or analysis.

III. STATEMENT OF THE CASE

A. Washington's Fossil Fuel-Based Energy and Transportation System Causes and Contributes to Climate Change

Respondents are responsible for creating, controlling, operating, and perpetuating Washington's fossil fuel-based energy and transportation system. This system, analogous to the state's education, foster care, and mental health systems,[1] is comprised of Respondents' aggregate and systemic actions with respect to "all components related to the production, conversion, delivery and use of energy"[2] and transportation of people, goods, and services throughout Washington. It is the constitutionality of this system, and Respondents' control and implementation thereof, that the Youth challenge. Examples of the unconstitutional aspects of the system are described in paragraphs 143-148 of the Youth's Complaint, emphasizing

[1] In similar challenges, courts have reviewed Washington's education, foster care, and mental health systems for constitutional compliance and correction. *See McCleary*, 173 Wn.2d 477 (state education system); *Braam ex. Rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003) (state foster care system); *Trueblood v. Wash. State Dep't of Social & Health Serv.*, No. C14-1178-MJP 2016 WL 4268933 (W.D. Wash. Aug. 15, 2016) (state mental health system).

[2] IPCC, 2014: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Cambridge, United Kingdom and New York, NY, USA, Annex I: Glossary, Page 1261 (defining energy system); RCW 42.21F.088(1)(b) (referencing the state's energy system and articulating the principles that guide implementation of the state's energy strategy); RCW 43.21F.010 (describing state's "comprehensive energy planning process").

the systemic nature of the problem from which the Youth seek this Court's protection. Clerk's Papers ("CP") 50-56. Data from Respondents' own documents confirms the state's energy and transportation system causes dangerous levels of GHG emissions, resulting in climate change. *See, e.g.*, CP 51-52, ¶ 145(a)-(h) (70.3 MMT of in-state CO_2 emissions from fossil fuel consumption in 2011; 4% higher by 2014). In fact, Respondent Ecology issued a report just last month showing Washington's GHG emissions have increased by about 6.1%, from 2012 to 2015, "primarily due to increased emissions from the electricity sector."[3]

Respondents admit that "[g]lobal warming is occurring and impacting the Earth's climate. At the same time, ocean acidification has been observed." CP 92. The global average CO_2 concentration was approximately 403 parts per million ("ppm") in 2016, compared to pre-industrial concentrations of 280 ppm, and is increasing at 2-3 ppm per year. CP 24, ¶ 56. Washington is responsible for a substantial amount of GHG emissions and these emissions are *increasing*, largely due to Respondents' fossil fuel-based energy and transportation system. CP 51, ¶ 145(b) (burning fossil fuels for transportation was the largest source of Washington's 2013 GHG emissions (42.8%), with electricity the next largest source (19.3%); ¶

[3] Wash. Dep't of Ecology, *Washington State Greenhouse Gas Emissions Inventory: 1990-2015: Report to the Legislature* (Dec. 2018), https://fortress.wa.gov/ecy/publications/documents/1802043.pdf.

145(a)-(h)). Respondents recognize that "[c]ontinued emissions of greenhouse gases will cause further warming and changes in all components of the climate system." CP 92.

The devastating impacts of climate change are well-documented in scientific literature and detailed in the Complaint. In summary, increased concentrations of GHGs have raised global surface temperature approximately 1°C from 1880 to 2016. CP 25, ¶ 59. The five hottest years on record have occurred in the last decade and every year since 1997 has been warmer than average in the United States. CP 25, ¶ 59. This warming is "already injuring and irreversibly destroying human and other natural systems, causing loss of life and pressing species to extinction." CP 24, ¶ 55. Ocean acidity, which negatively affects ocean life, particularly shellfish, is rising at least 100 times faster than at any period during the last 100,000 years, with Washington experiencing ocean acidification earlier than other parts of the world. CP 30-31, 208-09.

Since the 1970s, the average number of large wildfires in Washington has increased from 6 to over 21 per year. CP 33, ¶ 88. By 2050, wildfire activity in the Pacific Northwest is expected to double, increasing the annual mean area burned by 78%. *Id.* Increasing air and stream temperatures have already killed thousands of salmon in Washington rivers. CP 34-35, ¶ 92. Unabated climate change is likely to result in the extinction

of salmon, steelhead, and trout and, by the 2080s, the number of river miles where August stream temperatures surpass the thermal tolerances of adult salmon and char will increase by 1,016 and 2,826 miles, respectively. CP 35, ¶ 93. The loss of salmon is economically and culturally devastating, particularly for Native American Youth like Appellants Daniel, Kailani, James, and Kylie. *See, e.g.,* CP 7-9, ¶¶ 13-16, CP 13-14, ¶ 23, CP 28, ¶ 71, CP 29, ¶ 75.

Appellants James and Kylie live in Taholah, Washington, a Quinault coastal village that, because of climate change, sea level rise, and other climate change-induced impacts, must be relocated, though there is little funding for the $350 million endeavor. CP 7-8, ¶¶ 14-15, CP 36, ¶ 97. The loss of their place-based heritage, dating back to time immemorial, is irreplaceable, devastating, and permanent. CP 8, ¶ 14. Other communities and infrastructure in Washington face similar displacement. CP 36, ¶ 97.

B. The Youth's Long Quest to Protect Themselves from Their Government's Knowing Contribution to Climate Change

In 2011, a group of youth first filed a case against the state of Washington and state agencies alleging their failure to address climate change violated the Public Trust Doctrine. *Svitak, et al. v. State*, 178 Wn.App. 1020, 2013 WL 6632124 (Wash. Ct. App. 2013) (unpublished

opinion)[4] ("The complainants do not contend that the State violated a specific state law or constitutional provision, but instead challenge the State's failure to accelerate the pace and extent of greenhouse gas reduction."). The case was dismissed on political question grounds because "there [wa]s no allegation of violation of a specific statute or constitution." *Id.* at *1. The Court of Appeals did not reach the merits of the claims "[b]ecause [it] conclude[d] that Svitak [did] not challenge an affirmative state action or the State's failure to undertake a duty to act as unconstitutional[.]" *Id.* at *2.

Following the Court of Appeals' direction in *Svitak* as to justiciability, Washington youth next filed a 64-page petition for rulemaking, with supporting scientific information, with Respondent Ecology in June 2014, seeking science-based GHG emission reductions. *Foster ex rel. Foster v. Wash. Dep't of Ecology*, 200 Wn.App. 1035, 2017 WL 3868481, *1 (Wash. Ct. App. 2017) (unpublished opinion).[5] Ecology denied the petition and the Youth appealed under the Administrative Procedure Act (APA). *Id.*

[4] GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.
[5] GR 14.1. This is an unpublished decision and may be accorded such persuasive value as the court deems appropriate.

On November 19, 2015, the *Foster* Superior Court rejected Ecology's claims that it was doing enough to address climate change, finding that the "alternative approaches" Ecology identified as a basis for not denying the Youth's proposed rule "indisputably cannot achieve results protecting the state's environment from catastrophic global warming."[6] CP 324. The Superior Court acknowledged that "[t]he scientific evidence is clear that the current rates of reduction mandated by Washington law cannot achieve the GHG reductions necessary to . . . ensure the survival of an environment in which Petitioners can grow to adulthood safely." CP 326. The Superior Court did not originally grant relief, on the grounds that, while the case was being argued, Ecology commenced a process to promulgate the Clean Air Rule, WAC 173-442. CP 331. No party appealed the November 2015 order. After Ecology withdrew its draft Clean Air Rule, the Youth filed a CR 60(b) motion, seeking an order directing Ecology to promulgate a rule that protects Youth. *Foster*, 2017 WL 3868481 at *2. The Superior Court granted that motion, ordering Ecology to issue a rule by the end of 2016. *Id.* Ecology appealed the CR 60(b) order. *Id.*

On September 16, 2016, while the appeal was pending, Ecology released the final Clean Air Rule. CP 48-49, ¶¶ 138-139. Because the Clean

[6] Notably these are the same GHG mitigation approaches that have resulted in a 6.1% increase in GHG emissions from 2012-2015. *See supra* n.3.

Air Rule expressly authorized dangerous levels of GHG emissions, perpetuating the climate crisis, the Youth sought an order of contempt directing Ecology to regulate GHG emissions in a manner fulfilling its statutory and constitutional duties. *Foster*, 2017 WL 3868481 at *2.

On December 19, 2016, the Superior Court denied the Youth's motion, but granting *sua sponte* leave to file an amended pleading:

> Petitioners are GRANTED leave to amend their petition to plead therein a complaint for declaratory judgment or other action regarding their claims that respondent Ecology and/or others are violating their rights to a healthy environment as protected by statute, by Article I, Section 30, Article XVII, Section 1, and Article XVII, Section 1 of the Washington State Constitution and the Public Trust Doctrine embodied therein. The Court takes this action due to the emergent need for coordinated science based action by the State of Washington to address climate change before efforts to do so are too costly and too late.

Id.; CP 317-321.[7] The Court of Appeals denied the Superior Court permission to enter the order granting leave to amend the pleadings pending

[7] Ultimately, for a number of procedural reasons not relevant to the instant appeal, the Superior Court in the *Foster* case vacated the December 2016 order and, in April 2017, entered a substantially similar order granting the Youth's motion for leave to file an amended pleading, stating:

> Thus, considering the alleged emergent and accelerating need for science based response to climate change and the governmental actions and inactions since . . . the *Svitak* case, this Court does not find that case persuasive. It is time for these youth to have the opportunity to address their concerns in a court of law, concerns raised under . . . under the state and federal constitutions. They have argued their petition for a rule limiting GHG emissions based on best available science. A rule has now been adopted, which Ecology agreed during oral arguments on 11/22/16, is not intended to achieve the requirements of RCW 70.235.020.
>
> In their motion for an order to show cause for contempt, petitioners do not seek to have the Court direct Ecology to issue a different rule. Rather,

appeal of the CR 60(b) order and ultimately vacated the 60(b) order, even though Ecology had already fulfilled its requirements. *Foster*, 2017 WL 3868481 at *2, *7.

The Youth's protracted attempt to obtain an administrative rule that protects their rights proved futile after three years of litigation, during which time Washington's GHG emissions continued to rise significantly. Therefore, the Youth filed the instant case following the second path towards justiciability indicated by the Court of Appeals in the *Svitak* case and the Superior Court in *Foster*, challenging the constitutionality of the state's fossil fuel-based energy and transportation system and RCW 70.235.020. the GHG emission targets on which Respondents base all of their GHG mitigation measures. *Svitak*, 2013 WL 6632124 at *2.

C. The Superior Court Improperly Dismissed the Youth's Claims

Respondents moved to dismiss the instant complaint raising a number of arguments. CP 127-152. The Youth responded, CP 285-316, and the Superior Court allowed the League of Women's Voters, CP 169-177,

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> they asked the Court to retain jurisdiction of their claims so they can show evidence and argue that their government has failed and continues to fail to protect them from global warming. This Court gives them leave to amend their case so as to provide for their day in court where all aspects of their claims may be heard. Judicial efficiency and the urgency of these matters dictate that this Court which is advised in the matter thus far retain jurisdiction to avoid fractured presentation of the issues and unnecessary delay.

CP 321.

the faith community, CP 348-366, and environmental organizations, CP 191-215, to submit amicus briefs in support of the Youth. CP 386-87. The Superior Court granted Respondents' motion, CP 442-452, determining the claims raised nonjusticiable political questions. CP 447. Disregarding the Youth's multiple other substantive due process claims and plain statutory language, the Superior Court held there is no fundamental constitutional right to a healthful environment. CP 465-66. Ignoring the Youth's claims of discrimination with respect to their fundamental rights, the Superior Court held the Youth have not raised a cognizable equal protection claim, holding that they are not members of a suspect class, even though they were born into a dangerous climate system, will suffer the most severe consequences of climate change, and cannot vote. CP 468-69. Finally, the Superior Court did not decide the justiciability of the Youth's "other claims," offhandedly dismissing them "[f]or the reasons stated in Defendants' motion and reply memorandum . . . ." CP 469.

IV. STANDARD OF REVIEW

This Court reviews the dismissal of a complaint *de novo*. *P.E., Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012) (treating "a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss"). "All facts alleged in the complaint are taken as true, and [the court] may consider hypothetical facts supporting the plaintiff's

claim." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 963, 331 P.3d 29 (2014). Dismissal is only appropriate if "it appears beyond doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007)). Motions to dismiss are granted "'sparingly and with care,' and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *Id.* (citation omitted).

V. ARGUMENT

A. The Superior Court Erred in Dismissing the Youths' Substantive Due Process Claims

"Substantive due process forbids the government from interfering with a fundamental right unless the infringement is narrowly tailored to serve a compelling state interest." *In re Detention of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014). The Youth properly alleged Respondents violated their enumerated and unenumerated substantive due process rights and deserve their day in court. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 229, 143 P.3d 571 (2006) (this Court "has been a historical, long-standing leader in protecting individual's rights, especially those of the economically powerless.").

1. The Superior Court Erred in Finding The Youth Have No Fundamental, Inalienable Right To Live In A Healthful And Pleasant Environment.[8]

Washington's constitution safeguards "certain fundamental rights protected by the due process clause but not explicitly enumerated in the Bill of Rights." *In re Detention of Morgan*, 180 Wn.2d at 324. According to the U.S. Supreme Court:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty'. . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests required particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (internal citations omitted).

The Complaint alleges Respondents are violating the Youth's "fundamental and inalienable right to live in a healthful and pleasant environment" – a constitutional right statutorily recognized as "fundamental" by Washington's legislature. RCW 43.21A.010; 43.21C.020(3); 70.105D.010. The Complaint narrowly describes this right as including "the right to a stable climate system that sustains human life

[8] Notably, Governor Inslee did not join the other Respondents in challenging the merits of this claim. CP 146, n. 16. Accordingly, at the least, this claim should proceed against him since he does not question that this fundamental right exists.

and liberty." CP 61, ¶¶ 171, 173. In ruling that "[t]here is no such right to be found within our State Constitution," CP 466, the Superior Court erred in four ways: (1) disregarding plain statutory language; (2) mischaracterizing the nature of the right the Youth assert; (3) erroneously concluding that there is no such fundamental right reserved under Article I, Section 30 of the Washington Constitution; and (4) failing to undertake the proper analysis for identifying unenumerated fundamental rights

First, the Superior Court's conclusion runs contrary to the established principle that unenumerated fundamental rights under Washington's Constitution can be created by statute. *State v. Hand*, ___ Wn.2d ___, 429 P.3d 502, 508 (2018) (Madsen, J. concurring opinion) (emphasis added) ("[s]ubstantive due process necessarily requires that a fundamental right exists – either *in statute* or under the Constitution.") (emphasis added); *In re Pers. Restraint of McCarthy*, 161 Wn.2d 234, 240, 164 P.3d 1283 (2007) (quoting *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)) ("'A liberty interest may arise from the Constitution,' from 'guarantees implicit in the word 'liberty,' 'or from an expectation or interest created by state laws or policies.'").

The right to a healthful environment is the *only* right the Legislature has characterized as "fundamental and inalienable." If the statutory language is clear, "that is the end of the inquiry." *Ballard Square*

Condominium Owner's Ass'n v. Dynasty Const. Co., 158 Wn.2d 603, 612, 146 P.3d 914 (2006). The personal opinion of a judge of the Superior Court that a healthful environment and stable climate system "is a shared aspiration – the goal of a people, rather than the right of a person" cannot override the plain language of the Legislature.[9] CP 467. The Legislature's explicit use of the terms "fundamental and inalienable," distinguishes this right from those important interests that are merely protected, rather than fundamental. *See, e.g., Amunrud*, 158 Wn.2d at 222 ("pursuing a lawful private profession . . . is a protected right under the . . . constitution[]," not a fundamental right, but still applying rational basis review).

Second, the Superior Court expressly mischaracterized the nature of the right the Youth seek to protect: narrowly defined as the right to a stable climate system that sustains human life and liberty. CP 61, ¶¶ 171, 173. The Superior Court misconstrued this right as the right to be free from harmful contaminants. CP 449. The Superior Court's reliance on one inapposite, out-of-state, unpublished decision makes this error clear. CP

[9] The Superior Court's conclusion that the right to a stable climate system is a mere "desirable objective[]" or "shared aspiration" comparable to "world peace" and "economic prosperity" is not only contrary to legislative findings, but inapt. CP 467. Even in the areas of "world peace" or "economic prosperity," when government is alleged to have actively discriminated against or deprived an individual of life or liberty, or of an economic interest, without adequate constitutional justification or process, courts adjudicated such claims on the merits. *See, e.g.*, *Rotsker v. Goldberg*, 453 U.S. 57 (1981) (equal protection challenge to military draft); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (constitutional challenge to discrimination in distribution of food stamps).

448-49 (citing *Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879 (E.D. Mich. Feb. 28, 2017)). *Lake* neither involved government causation of climate change, a legislatively recognized "fundamental and inalienable" right to a healthful environment, nor the narrowly circumscribed right the Youth assert here. Moreover, the *Lake* plaintiff did "not specify the right underlying her § 1983 claim." *Id*. at *3.

No other court has rejected the fundamental nature of the right the Youth assert. Indeed, the only other court to consider the existence of a fundamental due process right similar to that asserted by the Youth, recognized such a right exists under the U.S. Constitution, explaining, "[j]ust as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" *Juliana v. United States*, 217 F. Supp.3d 1224, 1250 (D. Or. 2016) (citations omitted). The *Lake* court acknowledged that, in recognizing a right to "a climate system capable of sustaining human life," the *Juliana* court provided a "careful description" of a "very narrow right," as is required when courts identify previously unrecognized fundamental rights. 2017 WL 767879, at *4, n. 3 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). The *Lake* decision does not consider the *Juliana* case an "outlier;" it simply found the District of Oregon articulated a more circumscribed right than the general right to be free from

harmful contaminants. *Id.* The Youth use the same "careful description" of their asserted liberty interest to live in a healthful and pleasant environment and are entitled to present evidence to show how Respondents have violated that right. *Braam ex rel Braam v. State*, 150 Wn.2d 689, 699, 81 P.3d 851 (2003) (quoting *Glucksberg*, 521 U.S. at 721) ("Modern substantive due process jurisprudence requires a 'careful description of the asserted fundamental liberty interest.'").

Third, the right to live in a healthful environment, including the right to a stable climate that sustains human life and liberty, reflects an inherent attribute of the Youth's substantive due process rights to be free from government actions that knowingly harm their life, liberty, and property.[10] The Washington Constitution expressly recognizes that "[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights" and that "[t]he enumeration in this Constitution of certain rights shall not be construed to deny others retained by the

[10] Erroneously concluding that "[n]o specific constitutional mandate relates to" this claim, CP 467, the court ignored the "specific constitutional mandate" that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. Art. I, § 3. *See McCleary*, 173 Wn.2d at 518-19 ("The vast majority of constitutional provisions, particularly those set forth in . . . our constitution's declaration of rights, are framed as negative restrictions on government action. With respect to those rights, the role of the court is to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries.").

people." Wash. Const. art. I, §§ 1, 30; *see also* art. XVII, § 1. Citing these provisions, this Court stated:

> The legislature represents this sovereignty of the people, except as limited by the constitution. . . . [Section 30] is apparently the expression that the declaration of certain fundamental rights belonging to all individuals and made in the bill of rights shall not be construed to mean the abandonment of others not expressed, which inherently exist in all civilized and free states. Those expressly declared were evidently such as the history and experience of our people had shown were most frequently invaded by arbitrary power, and they were defined and asserted affirmatively. Consistently with the affirmative declaration of such rights, *it has been universally recognized by the profoundest jurists and statesmen that certain fundamental, inalienable rights under the laws of God and nature are immutable, and cannot be violated by any authority founded in right.*

State v. Clark, 30 Wn. 439, 443-44, 71 P. 20 (1902) (emphasis added). The Legislature has recognized the right to a healthful and pleasant environment is one of those "fundamental, inalienable rights." *Id*.; RCW 43.21A.010.

Fourth, proper application of the analysis for identifying unenumerated fundamental rights mandates that the Youths' claim to violation of their right to live in a healthful environment, including a stable climate system that sustains human life and liberty, should proceed. The Superior Court's conclusion that this right is not fundamental for substantive due process purposes rested in part on its assertion that it is not an "individual" right like the right to marriage. CP 467 (citing no precedent). Washington courts have rejected that narrow approach to

defining fundamental rights: "The Department asserts that substantive rights can be created only by fundamental interests derived from the Constitution and that the protections of substantive due process are limited to such matters as marriage, family, and procreation. *This is clearly incorrect*." *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 56 n.7, 309 P.3d 1221 (Wash. Ct. App. 2013) (emphasis added).[11]

To establish a fundamental right, courts must examine whether an asserted right is either: "'objectively, deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 600, 192 P.3d 306 (2008) (citation omitted). The identification of fundamental rights "has not been reduced to any formula[;]" "history and tradition guide and discipline this inquiry but do not set its outer boundaries." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015). The catalog of fundamental rights is

[11] Not all fundamental rights require an individual's personal choice in order for a person to avail themselves of their protection (like the choice to marry). In this respect, the right to a climate system that sustains human life and liberty is akin to the right to freedom from unlawful restraint: it operates as a limit on government action irrespective of the Youths' intimate individual choices. Regardless, Respondents' knowing causation and contribution to the destabilization of the climate system has *profound* effects on these Youths' intimate, personal, constitutionally protected choices, including their choices and abilities to safely raise families and to learn, practice, and transmit their cultural, religious, and spiritual traditions and beliefs. *See, e.g.,* CP. 6-8, ¶¶ 13-15; CP 13-14, ¶ 23; CP 57, ¶ 154. The Superior Court completely ignored these allegations. In doing so, the it failed to "take the facts alleged in the complaint. . . in the light most favorable to the nonmoving party." *FutureSelect Portfolio Mgmt., Inc.*, 180 Wn.2d at 962.

intended to grow as society develops. *Id.* at 2598. Important fundamental rights include those that are "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), or required "to enable the exercise of all rights, whether enumerated or unenumerated." *Juliana*, 217 F.Supp.3d at 1249; *see also Obergefell*, 135 S.Ct. at 2599 (enumerated liberty right inherently encompasses right to marry).

Proper application of these standards demonstrates that the right to live in a healthful environment, including the right to a climate system that sustains human life and liberty, is both "fundamental to our scheme of ordered liberty" and "preservative of all rights" because a "stable climate system is a necessary condition to exercising other rights to life, liberty, and property." *Juliana*, 217 F. Supp.3d at 1250. Further, this right is "deeply rooted in . . . history and tradition" as demonstrated by, among other things, legislative recognition of its "fundamental and inalienable" nature. RCW 43.21A.010.[12] Respondents' knowing, systemic causation of and contribution to dangerous climate change, and the impacts injuring these Youth, is precisely the type of conduct that "reveals discord between the

[12] Development of a full factual record in this case will further demonstrate the history and tradition of this fundamental right. Importantly, on summary judgment in *Lake*, the plaintiff was afforded an opportunity, but failed to "adduce[] any evidence that her alleged right is rooted in our nation's traditions or implicit in the concept of ordered liberty[.]" 2017 WL 767879 at *4. The Youth were afforded no such opportunity here.

Constitution's central protections and a perceived legal stricture," requiring that their "claim to liberty be addressed." *Obergefell*, 135 S.Ct. at 2598.

2. The Youth Also Alleged Infringement of Well-Recognized Fundamental Substantive Due Process Rights

By focusing solely on the constitutionally-reserved and statutorily-recognized "fundamental and inalienable right . . . to live in a healthful and pleasant environment," CP 466-68, the Superior Court did not address the Youth's alleged infringement of other fundamental substantive due process rights, including their enumerated rights to life, liberty, and property, and other well-recognized unenumerated rights, including the rights to be free from an unreasonable risk of harm,[13] to reasonable safety,[14] to personal security,[15] to maintain bodily integrity,[16] to family autonomy,[17] and the right to learn and practice their religious, cultural, and spiritual beliefs and traditions.[18] CP 57-58, ¶¶ 153-54, 159. This is a legal error.

B. The Superior Court Erred in Dismissing the Youth's Equal Protection Claims

"'The aim and purpose of the special privileges and immunities provision of Art. I, § 12, of the state constitution'" is "'to secure equality of

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[13] *Braam ex rel. Braam*, 150 Wn.2d 689.
[14] *Id.*
[15] *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).
[16] *Glucksberg*, 521 U.S. at 719-20.
[17] *Moore v. City of E. Cleveland, OH*, 431 U.S. 493 (1977) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972).
[18] *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 148, 166 (1944); *Yoder*, 406 U.S. at 211-212.

treatment of all persons, without undue favor on the one hand or hostile discrimination on the other.'" *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 634-35, 911 P.2d 1319 (1996) (en banc) (quoting *State ex rel. Bacich v. Huse*, 187 Wn.75, 80, 59 P.2d 1101 (1936)). Respondents' conduct in knowingly operating a fossil fuel-based transportation and energy system and enacting RCW 70.235.020, which authorizes dangerous levels of GHGs, discriminates "against Plaintiffs as members of a protected class of youth in favor of the short-term economic interests of industry and present generations of adults and . . . with respect to their fundamental rights. . . ." CP 65-70. The Superior Court erred by focusing only on the Youth's argument that they are members of a suspect class, and incorrectly resolved that question.

This Court has articulated the following standards "to determine whether the equal protection clause has been violated:"

> First, strict scrutiny is applied when a classification affects a fundamental right or a suspect class. Second, intermediate scrutiny is applied when a classification affects both a liberty right and a semi-suspect class not accountable for its status. The third test is rational basis. Under this inquiry, the legislative classification is upheld unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives."

State v. Harner, 153 Wn.2d 228, 235-36, 103 P.3d 738 (2004) (en banc). The Superior Court failed to apply any of these standards. *Maehren v. City*

of Seattle, 92 Wn.2d 480, 490, 599 P.2d 1255 (1979) (emphasis added) ("In an equal protection challenge, *a necessary initial determination* is the proper level of judicial scrutiny applicable to the challenged classification.").

As discussed above, the Youth have numerous fundamental rights implicated by Respondents' affirmative conduct. Section V(A), *supra*. The Superior Court ignored these fundamental rights and the Youth's claims of discrimination with respect to them. CP 65-70. As such, irrespective of the Superior Court's conclusions regarding the Youth's protected status, the Court erred in dismissing the Youth's equal protection claims without applying strict scrutiny. *Am. Legion Post #149*, 164 Wn.2d at 609 ("Strict scrutiny also applies to laws burdening fundamental rights or liberties.").

Furthermore, by erroneously focusing solely on the Youth's age characteristics and ignoring their vulnerable status as children born into dangerous climate change, the Superior Court incorrectly concluded the Youth's "equal protection claim is without merit." CP 450. Finding "age is not immutable," and that Youth are neither "an insular minority," nor "without power or influence," the Superior Court did not address the Youth's other characteristics supporting their status as members of a suspect or semi-suspect class. CP 450-51.

"To show a violation of the equal protection clause, a party must first establish that the challenged act treats unequally two similarly situated classes of people." *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 760, 733 P.2d 539 (1987). Here, Respondents' conduct in causing and contributing to dangerous climate change prioritizes the wellbeing of current generations of adults over these Youth – the living generation that will be most affected by climate change. Youth as a class do not have economic power to influence the state's energy and transportation system because they do not own property or earn wages and are unable to protect themselves through the political process because they do not yet have the right to vote. *Am. Legion Post #149*, 164 Wn.2d at 609 n.31 (a suspect class requires a history of discrimination, political powerlessness, or an immutable trait that is unrelated to their ability to contribute to society). There is ample factual support for this notion in the record. *See* Section III(B), *supra*.

The Superior Court improperly concluded that "age is not immutable," positing that "each plaintiff, like every human, will grow older." CP 450. The Superior Court also incorrectly concluded, without analysis, that the Youth "are not an 'insular minority.'" CP 468. However, the U.S. Supreme Court has made clear that heightened scrutiny is applied when discriminatory conduct is "directed against children, and imposes its

discriminatory burden" on the basis of a characteristic over which they "can have little control." *Plyler v. Doe*, 457 U.S. 202, 219-20, 226 (1982).

While this Court previously declined to afford juveniles protected status, *State v. Schaaf*, 109 Wn.2d 1, 17-19, 743 P.2d 240 (1987), it "did so because" it "concluded that children in general were more socially integrated – and thus better represented in the democratic process – than the 'discrete and insular minorities' considered suspect classes for purposes of federal equal protection analysis." *Schroeder v. Weighall*, 179 Wn.2d 566, 578, 316 P.3d 482 (2014) (en banc) (quoting *Schaaf*, 109 Wn.2d at 17, 19). However, where evidence showed that a challenged "law places a disproportionate burden," on Youth, a "group of minors most likely to be adversely affected by [government action] may well constitute the type of discrete and insular minority whose interests are a central concern in our state equal protection cases." *Id.* at 578-79. That is the case here, where the Youth have alleged that "the impacts associated with the CO_2 emissions of today will be mostly borne by our children and future generations." CP 38, ¶ 106. By knowingly operating a fossil fuel-based energy and transportation system that results in dangerous levels of GHG emissions, and by expressly allowing such emissions through 2050 by enacting RCW 70.235.020, Respondents have placed a disproportionate burden on children, including the Youth.

Furthermore, children possess and exhibit significant immutable characteristics; they are socially, emotionally, physically, and psychologically vulnerable and different from adults in manners beyond their control. Indeed, the U.S. Supreme Court has recognized the immutable characteristics of childhood: "'youth is more than a chronological fact' . . . It is a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage.'" *Miller v. Alabama*, 567 U.S. 460, 476 (2012) (citations omitted).[19] Children are particularly vulnerable to climate change impacts and historic and continuing GHG emissions consign children and future generations to catastrophic and likely irreversible harms that today's generation of adults will not experience. CP 15, ¶ 26, CP 38, ¶ 105 (children are more vulnerable to the mental and physical health risks associated with climate change), ¶ 106 (around 20% of CO_2 emitted persists in the atmosphere for centuries and thus the impacts of today's CO_2 emissions will be mostly borne by children and future generations), ¶ 107, CP 65, ¶ 188, CP 68, ¶ 201, CP 70, ¶ 207.[20] These

[19] *See also State v. Bassett*, 192 Wn.2d 67, 81, 428 P.3d 349 (2018) (quoting *Miller*, 567 U.S. at 481 ("[t]his court has consistently applied the *Miller* principle that 'children are different'" and "recogniz[ing] that children warrant special protections in sentencing.").

[20] The Superior Court further erred in concluding, contrary to the Complaint, that "[w]e are *all*, *regardless of age*, experiencing climate change" and that the Youth "cannot prove any set of facts to establish that they have been discriminated against regarding climate change . . . ." CP 468. The Superior Court disregarded the factual allegations in the Complaint detailing the specific, individual and unique harms being experienced by each Youth; harms that are more severe because of their young age. CP 5-15, ¶¶ 12-24.

Youth cannot grow older any faster, nor can they possibly alter their generational characteristics determined by the dangerous climate conditions into which they were born – immutable "characteristic[s] determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

The Superior Court also erred by failing to consider and accept as true the Youth's factual allegations demonstrating the history of discrimination against their asserted class. Specifically, Respondents have a "long history of deliberately discriminating against children and future generations, including Plaintiffs, in exerting their sovereign authority for the economic benefit of industry and present generations of adults." CP 65, ¶ 188. Respondents' own documents, described in the Complaint, establish that they have long known of the dangers their actions pose to the Youth's class, yet Respondents continue to implement policies that exacerbate that danger, despite clear alternatives. *See, e.g.,* CP 47, ¶ 134 (2014 Ecology report acknowledging "[w]e are imposing risks on future generations (causing intergenerational equities) and liability for the harm that will be caused by climate change that we are unable or unwilling to avoid."); CP 38-39, 44, ¶¶ 107, 124 (2008 Ecology report stating: "[f]ailure to act now will make future Washingtonians vulnerable to fluctuations in energy prices, political instability, and the effects of climate change from reliance

on carbon-based fuels" and recognizing "[t]he urgent need for a veritable energy revolution. . . .").

In assuming, without any evidentiary support, that the Youth can protect their rights with "conditional (not complacent) optimism"[21] through lobbying the legislative and executive branches (CP 469-70), the Superior Court disregarded the Youth's allegations of the long, entrenched, systemic history of Respondents' knowledge, causation of and contributions to climate change – a history demonstrating invidious discrimination against the Youth's class. CP 41-50. In fact, by legalizing dangerous emissions through 2050 in RCW 70.235.020, Respondents ensured that resulting harms to the Youth will continue and be locked in. CP 24, ¶ 55. The judiciary is the Youth's last and only resort, just as it was for the children seeking to desegregate their schools in *Brown v. Bd. of Education*, 347 U.S. 483 (1953).

C. The Claims Addressed by the Superior Court Are Entitled To, At Least, Intermediate or Rational Basis Review

Even if this Court were to condone the Superior Court's errors in finding that the right to live in a healthful environment is not fundamental,

[21] The Superior Court's reliance on Steven Pinker, an outside source for this proposition, illustrates the Court's failure to accept as true the well-pleaded allegations in the Complaint. Most assuredly, the Youth who are forced to relocate from their home and school do not feel optimistic, particularly as they see GHG emissions in Washington continuing to rise.

in ignoring the Youth's alleged violations of and discrimination with respect to other fundamental rights, and that the Youth are not members of a suspect class, that should not result in dismissal of all claims. Rather, intermediate scrutiny applies when there is a deprivation of an important right and the classification involves a semi-suspect class, not accountable for its status. *Westerman v. Cary,* 125 Wn.2d 277, 294, 892 P.2d 1067 (1994). Where a due process challenge implicates no fundamental right, or an equal protection challenge implicates neither a protected class nor a fundamental right, "the proper standard of review is rational basis." *In re Detention of Morgan*, 180 Wn.2d at 324.[22] At the very least, the Youth are entitled to put on their case that there is no rational basis for the state's challenged actions. *See Nielsen*, 177 Wn. App. at 56 n.7 (rejecting as "without merit" the position that a plaintiff "cannot assert a viable substantive due process claim because the right to appeal is not a fundamental interest.").

D. The Political Question Doctrine Does Not Bar The Court's Review of The Youth's Constitutional Claims

The Superior Court erred in concluding that "the issues involved in this case are quintessentially political questions" that must be addressed

[22] As explained in Sections V(A)(2), (V(A)(B), *supra*, Respondents never challenged and the superior court never addressed the Youths' substantive due process claims to infringement of their well-established and previously recognized fundamental rights, nor their claims of discrimination with respect to their fundamental rights. Consequently, the wholesale dismissal of the Youths' case is erroneous on this additional basis.

solely "by the legislative and executive branches." CP 462. There *are no* "quintessential" political questions because the proper analysis requires "a discriminating inquiry into the precise facts and posture of the particular case." *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Seattle School Dist. No. 1 of King County*, 90 Wn.2d at 507 (citing *Baker*, 369 U.S. at 217). The Youth's claims call upon the court to engage in its traditional and core duty to interpret and enforce Washington's Constitution. *Seattle School Dist. No. 1 of King County*, 90 Wn.2d at 507 (constitutional interpretation falls "within the traditional role accorded courts to interpret the law" and does not implicate the *Baker* factors). The Superior Court's refusal to hear the Youth's constitutional claims flies in the face of long-standing principles of State and federal law:

> [U]nder our form of government, and in our way of life in this country, it is accepted . . . that the interpretation of constitutional provisions is not only a proper and a very necessary function, but also is a duty and a responsibility of the judicial branch of our government.

State ex rel. Swan v. Jones, 47 Wn.2d 718, 738, 289 P.2d 982 (1955) (en banc).

Our tripartite structure of government allows each branch "to exercise limited control over the others in the form of checks and balances." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 613, 229 P.3d 774 (2010); *Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 242, 552 P.2d 163

(1976) ("[C]omplete separation was never intended and overlapping functions were created deliberately."). "Once it is determined that judicial interpretation and construction are required, there remains no separation of powers issue." *Seattle School Dist. No. 1 of King County*, 90 Wn.2d 476 at 504.

The Superior Court erroneously focused on a mischaracterization of the Youths' requested relief and the scope of the judiciary's equitable powers. As an initial matter, it is entirely premature at this early stage to speculate as to the propriety of any relief that may ultimately be awarded. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.") (citation omitted); *McCleary*, 173 Wn.2d at 546 ("While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all."). The political question inquiry focuses on the claims presented, not the relief requested. *Baker*, 369 U.S. at 198 ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at trial.").

Further, contrary to the Superior Court's conclusions, the Youths' requested relief would not require it to make policy or "usurp the roles of

legislative and executive branches of our state government." CP 465. It is not the role of the legislative and executive branches to police their own actions for constitutional compliance. The Youth seek a declaration of the constitutional safeguard necessary to protect their fundamental rights and an order for Respondents to develop and implement a plan *of their own devising* to remedy their constitutional violations. This is a familiar and well-established remedial model squarely within the judiciary's power and competence. *See, e.g.*, *Seattle School Dist. No. 1 of King County*, 90 Wn.2d at 518 (while the legislature has the authority to devise the details of the education system, "the judiciary is primarily concerned with whether the Legislature acts pursuant to the [constitutional] mandate and, having acted, whether it has done so constitutionally"). In *McCleary*, granting similar relief to that requested here, this Court stated:

> A better way forward is for the judiciary to retain jurisdiction over this case to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty. This option strikes the appropriate balance between deferring to the legislature to determine the precise means for discharging its article IX, section 1 duty, while also recognizing this court's constitutional obligation.

173 Wn.2d at 545-46*; see also Brown v. Plata*, 563 U.S. 493 (2011) (approving Eighth Amendment remedy ordering state to develop and implement plan to reduce prison populations to no more than 137.5% design

capacity). As in *Plata*, the Superior Court can set the constitutional floor necessary for preservation of the Youth's rights – the maximum safe level of CO_2 concentrations and the timeframe in which that level must be achieved – and leave to Respondents the specifics of developing and implementing a compliant plan.[23]

Finally, even if the relief requested ultimately implicated separation of powers concerns, the Superior Court can tailor or provide alternative remedies as necessary. *See, e.g., McCleary*, 173 Wn.2d at 546. It is the court's duty to hear and decide the Youth's constitutional claims, regardless of whether the source of the harm involves climate change. *New York Times, Co. v. United States*, 403 U.S. 713, 742-43 (1971) (Marshall, J. concurring) ("[C]onvenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.").

E. The Superior Court's Dismissal Of The Youth's "Other" Claims For Unspecified Reasons Is Erroneous

The Superior Court erroneously dismissed the Youths' remaining claims "[f]or the reasons stated in [Respondents'] motion and reply

[23] Respondents have existing constitutional and statutory authority to come into constitutional compliance without the need for new legislation. Respondents can remedy their constitutional violations with the same authorities they have discretionarily interpreted and employed to systemically infringe the rights of these Youth. *See, e.g.*, RCW 70.94.331; RCW 43.21F.010; CP 16-23, ¶¶ 29–45. No additional statutory authority is needed for Defendants to cease their ongoing unconstitutional conduct. Further, contrary to Respondents argument below that the Youth's requested relief seeks to compel discretionary action, constitutional compliance is not discretionary. *See Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000).

memorandum." CP 469. As set forth in the Youth's briefing in the Superior Court, and below, none of those reasons supports dismissal.

1. The Youth Alleged a Viable State-Created Danger Claim

After placing the Youth in danger by knowingly causing and allowing dangerous levels of GHG emissions, Respondents' continuing pursuit and implementation of policies that cause significant GHG emissions and their continuing failure to reduce emissions, constitutes a viable state-created danger due process claim. CP 59-60, ¶¶ 161-167. The Superior Court did not address the Youth's Second Claim for Relief.

Ordinarily, government actors do not have an affirmative obligation to protect under the due process clause. *DeShaney v. Winnebago Cty. Dep't of Soc. Serv.*, 489 U.S. 189, 195 (1989).[24] However, an affirmative obligation to protect arises when government conduct places a claimant "in peril in deliberate indifference to their safety." *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997); *Braam ex rel Braam*, 150 Wn.2d at 699-700 ("Exposure of the child to an unreasonable risk of harm violates the substantive due process clause."). Culpability for substantive due

[24] Contrary to Respondents' argument below that no substantive due process duty to protect arises except "out of certain special relationships assumed or established by the state," CP 149, *DeShaney* established two *separate* bases for a duty to protect: the "special relationship" exception and the "state-created" danger exception, which the Youth allege here. *See Triplett v. Washington State Dept. of Soc, and Health Serv.*, 193 Wn.App. 497, 514, 373 P.3d 279 (Wash. Ct. App. 2016).

process violations is judged by whether the challenged conduct "shock[s] the conscience." *County. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998); *Braam ex rel. Braam*, 150 Wn.2d at 700.

Where children are placed in danger due to circumstances "far beyond their control," like when they are placed in foster care, this Court applies a standard more stringent than deliberate indifference:

> '[D]eliberate indifference' is not well suited for analyzing claims of the class. Foster children are entitled to a high standard. Something more than refraining from indifferent action is required to protect these innocents. . . . Foster children, because of circumstances usually far beyond their control, have been removed from their parents by the State for the child's own best interest. More often these children are victims, not perpetrators. Foster children need both care and protection. The State owes these children more than benign indifference and must affirmatively take reasonable steps to provide for their care and safety. . . . The State, as the custodian and caretaker of these children, is therefore liable for the harm allegedly caused by a violation of a foster child's substantive due process right to be free from unreasonable risk of harm and to reasonable safety only when his or her care, treatment, and services 'substantially depart from accepted professional judgment, standards or practice.'

Braam ex rel. Braam, 150 Wn.2d at 703-704 (internal citations omitted).

Similarly here, these Youth were born into dangerous climate conditions through no fault of their own. They cannot vote and have no say in the development and implementation of the energy and transportation system that is harming them and determining their future in undesirable

ways. It is appropriate for this Court to apply a higher standard, such as the professional judgment standard,[25] when analyzing the Youth's state-created danger claim.

Even if the professional judgment were not applicable, the Youth adequately alleged deliberate indifference. CP 59-60. Government acts with deliberate indifference when it has "actual knowledge of, or willfully ignore[s], impending harm" such that it "knows that something *is* going to happen but ignores the risk and exposes someone to it." *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996). A defendant is liable if they "'play[ed] a part' in the creation of a danger." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016). Here, Respondents have long known of the serious risk of burning fossil fuels and the dangers to which it exposes the Youth, yet continued to pursue the system that increase that danger, threatening the Youth's fundamental rights. CP 41-50, ¶ 115-142 (describing Respondents' long-standing knowledge and perpetuation of climate danger); *Juliana*, 217 F. Supp. 3d at 1251–52 (recognizing danger creation claim alleging defendants' role in and knowledge of climate crisis). Further, Respondents

[25] The professional judgment standard "would allow them to present proof that the decisions they complain of, while not deliberately indifferent to their substantive due process rights, were not the product of professional judgment." *Id.* at 703; *see, e.g.,* CP 56, ¶ 148 ("Non fossil-fuel based energy systems across all sectors, including electricity and transportation systems, are feasible and technologically available to employ in Washington . . . .").

have had ample opportunity to reverse course and reduce Washington's emissions at rates necessary to protect the Youth, yet have persisted in their dangerous systemic affirmative actions. CP 40, ¶¶112-114, CP 51-56 ¶¶145-148. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis*, 523 U.S. at 853.

Contrary to Respondents' arguments below, the Youth allege particularized harm to themselves, not harm to the general public. CP 5-15, ¶¶12-24. No case limits state-created danger claims to actions directed at particular individuals. Respondents have been intimately aware of how climate change affects individuals depending on a person's particular location, interests, age, and other circumstances, CP 5. ¶10, CP 25, ¶57, CP 41-50, ¶¶115–42. The Youth's injuries correspondingly vary according to the same criteria. CP 5-15, ¶¶12–24. Further, state-created danger case law establishes its applicability to claims involving exposure to harmful environmental media like those befalling the Youth, notwithstanding the danger such conditions may pose to the general public. *See, e.g., Pauluk*, 836 F.3d at 1125 (toxic mold); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082 (9th Cir. 2000) (freezing weather).

2. The Youth Alleged Viable Public Trust Doctrine Claims

The Youth adequately allege Respondents have abdicated control over Public Trust Resources, resulting in substantial impairment to those resources, including but not limited to navigable waters and submerged lands.[26] CP 61-64; *Chelan Basin Conservancy*, 190 Wn.2d at 267 ("[W]e have always embraced our constitutional responsibility to review challenged legislation . . . to determine whether that legislation comports with the State's public trust obligations."); *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987). Respondents raised three arguments regarding the Youth's Public Trust claims, all of which are unfounded.

a. The PTD Applies to All Common Natural Resources, Including the Atmosphere.

Respondents argued the Youth did not assert a viable Public Trust claim because "the Public Trust Doctrine is limited to navigable waters and underlying lands." CP 144. That argument is not dispositive because the Youth alleged impairment to traditional Public Trust Resources such as navigable waters and submerged lands. CP 1-72, *passim* (detailing acidification and warming of navigable waters, erosion of shorelands, rising seas and altered tidelands, storm-surge flooding of tidelands, declines of

[26] The Youth's Public Trust claims includes a direct challenge to RCW 70.235.020. CP 67-70; *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 267, 413 P.3d 549 (2018) (emphasis added) ("Because of the doctrine's constitutional underpinning, *any* legislation that impairs the public trust remains subject to judicial review.").

fisheries, and restrictions to access and use of such resources). As such, even if this Court declines to reach the question of whether the atmosphere is a Public Trust Resource, the Youth's Public Trust claim can still proceed.

The Youth also seek a declaration that the atmosphere is a Public Trust Resource. Although Washington courts have not yet applied the Doctrine to natural resources other than water, shorelands, tidelands, and shellfish, this Court has not expressly limited the Doctrine to these resources. In *Rettkowski v. Dep't of Ecology*, this Court intentionally avoided delineating the scope of the Doctrine. 122 Wn. 2d 219, 232 n.5, 858 P.2d 232 (1993). Similarly, in the other cases Respondents cited below, the Court expressly chose to not address the Doctrine's scope, deciding those cases on other grounds. *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137 Wn. 2d 118, 134, 969 P.2d 458 (1999); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203 (Wash. Ct. App. 2004); *Chelan Basin Conservancy*, 190 Wn.2d at 258–61.

There is no legal or scientific basis to exclude the atmosphere from the Public Trust. First, "[t]he principle that the public has an overriding interest in navigable waterways and the lands underneath them has been dated by some jurists as far back as the Code of Justinian, which was developed in Rome during the 6th century." *Chelan Basin Conservancy*, 190 Wn.2d at 259; *Caminiti*, 107 Wn.2d at 668-69. "The Institutes of Justinian,

. . . states: '[T]he following things are by natural law common to all – the air, running water, the sea and consequently the sea-shore.'" *Rettkowski*, 122 Wn.2d at 243 (Guy, J., dissenting). Since the origins of the Public Trust Doctrine explicitly applied to the air, it is illogical to read that common natural resource out of the present-day scope of the Public Trust.

Second, from a scientific perspective, "the navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical." CP 329; *see also Juliana*, 217 F.Supp.3d at 1255 n.10 ("Even Supreme Court case law suggests the atmosphere may properly be deemed part of the public trust *res*."). The Legislature has explicitly recognized the connection between "all environmental media, including air, water, and land." RCW 70.94.011. It would be scientifically untenable for this Court to draw an arbitrary distinction between navigable waters, submerged lands, and the atmosphere.

b. Respondents Must Protect Public Trust Resources

Because the Doctrine is "partially encapsulated" in Article 17 of the Washington Constitution, as trustees, all government actors—including agencies to whom the Legislature delegates authority—have a legal obligation to manage and prevent substantial impairment to Public Trust Resources under their regulatory jurisdiction. *Chelan Basin Conservancy*,

190 Wn.2d at 266. Legal precedent establishes that agencies managing Public Trust Resources, whether shellfish, water, or air, "ha[ve] a continuing obligation under the public trust doctrine to manage the use of the resources on the land for the public interest." *Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res.*, 124 Wn. App. 441, 450, 101 P.3d 891 (Wash. Ct. App. 2004); CP 329 ("the Public Trust Doctrine mandates that the State act through its designated agency to protect what it holds in trust.").

Below, Respondents incorrectly relied on *Fischer-McReynolds v. Quasim*, to assert that the Governor lacks authority to carry out the State's Public Trust responsibilities. 101 Wash. App. 801, 6 P.3d 30 (2000), *as amended* (Aug. 11, 2000). CP 146. However, as that case explains, the Governor can issue directives, "which serve to communicate to state agencies what the Governor would like them to accomplish [and] agency heads risk removal from office if they do not comply with the order." *Id.* at 813. There is no question that the Governor (and the state, also a named defendant) must comply with the Public Trust Doctrine (which Respondents admit is encapsulated in the constitution) when implementing his authority. CP 144.

Further, irrespective of whether the Public Trust Doctrine imposes *affirmative* obligations on Respondents to act, the Youth clearly allege that

Respondents' historic and continuing affirmative actions, including but not limited to the enactment of RCW 70.235.020, have *alienated* and *substantially impaired* Washington's protected Public Trust Resources in violation of their duties. CP 61-64, ¶¶ 174–84; CP 67-70, ¶¶ 196-207. The Superior Court erred in dismissing the Youths' Public Trust claims in reliance on Respondents' arguments.

3. The Youth Alleged a Viable Constitutional Challenge To RCW 70.235.020

In their Sixth Claim for Relief, the Youth partially challenge the constitutionality of RCW 70.235. Specifically, the Youth allege that RCW 70.235.020(1)(a) and RCW 70.235.050(1)(a)-(c) legalize dangerous levels of cumulative GHG emissions and perpetuate an unconstitutional energy and transportation system, harming the Youth. CP 67-70, ¶¶ 196-207. As the Youth explained:

> Having an emissions level target of 50% (statewide) and 57% (state agencies) by 2050 embedded in law inevitably permits the State and its agencies [(Respondents)] to violate the constitutional rights of children, including the Plaintiffs. It is akin to saying in a statute that public education for children can be funded at 50%, or only 50% of public schools need be desegregated to protect the rights of African American children.

CP 70, ¶ 207. The Court dismissed the Youth's challenge to RCW 70.235 with no analysis.[27] A core role of the judiciary is to review statutes for constitutionality and this Court "do[es] not shrink from [its] responsibility." *State v. Fain*, 94 Wn.2d 387, 402, 617 P.2d 720 (1980) (en banc).

4. The Youths Properly Pleaded Claims Under The UDJA

Respondents admit "[t]he UDJA can . . . be used to determine statutory and constitutional rights in an appropriate case." CP 133. This is an appropriate case. The UDJA "is to be liberally construed and administered." RCW 7.24.120. Respondents' argued below the parties lack "genuine and opposing interests" and that a judicial determination of the dispute will not be "final and conclusive." CP 133-35; *Kitsap County v. Kitsap County Correctional Officers Guild, Inc.*, 179 Wn. App. 987, 994, 320 P.3d 70 (2014). Both arguments are unfounded and unsupported by legal authority.

a. The Parties Have Genuine and Opposing Interests

[27] In *Pasado's Safe Haven v. State*, the court refused to partially invalidate a statute because it would "effect a result that the legislature never contemplated nor intended to accomplish." 162 Wn. App. 746, 754, 259 P.3d 280 (2011). That is not what the Youth seek here. The legislature intented to: "(a) Limit and reduce emissions of greenhouse gas consistent with the emission reductions established in RCW 70.235.020; (b) minimize the potential to export pollution, jobs, and economic opportunities; and (c) reduce emissions at the lowest cost to Washington's economy, consumers, and businesses." RCW 70.235.005(3). As the Youth alleged, the targets do the opposite, which is uncontrovertible ten years after the targets were enacted and GHG emissions continue to grow. CP 67-70, ¶¶ 196-207. As the Youth clarified in their brief below, if the court believes that the challenged sections are not severable, then the Youth seek full invalidation of the statute. CP 309-10.

Genuine and opposing interests exist when parties dispute the existence of legal right or duty. *Id.* at 994–95. Not only do Respondents dispute the existence and applicability of the Youth's asserted legal rights and Respondents' duties thereunder, they dispute their creation, operation, and maintenance of a fossil fuel-based energy and transportation system and their knowledge that it creates an unreasonable risk of present and future harm to the Youth. CP 84, ¶¶ 2-3, CP 105, ¶¶ 145, 151, CP 106, ¶ 154.

Regardless of Respondents' purported "fundamental interest" in reducing Washington's greenhouse gas emissions, the facts alleged in the Complaint demonstrate Respondents' fidelity to a course of conduct that is causing dangerous climate change. CP 50-56. Respondents' unsupported and false claim that they are "ambitiously" using their authority to reduce GHG emissions is completely contradicted by their own documents and Washington's growing GHG emissions. *See, e.g.*, CP 51-52, ¶ 145(a)-(h). Respondents' have vigorously opposed, on numerous occasions, including in this suit, requests to reduce the state's GHG emissions by rates necessary to avert catastrophic climate change and preserve these Youths' fundamental rights. *See, e.g.,* CP 46-47, ¶¶ 133-34. The opposing interests of the Parties could not be more clear.

b. The Court Can Provide a Final and Conclusive Remedy

Respondents argued below that the courts cannot provide a final and conclusive remedy in this case. CP 134. Respondents admit the UDJA allows a "declaration of rights," but ignore the declaratory relief the Youth seek in this case. CP 70-71 (Request for Relief (A)-(E)). Further, as demonstrated in Section V(D), *supra*, Respondents mischaracterize the injunctive relief the Youth seek under RCW 7.24.080 and 7.40.[28] Arguments about the appropriate relief to protect the Youth's interests are entirely speculative prior to this Court's delineation of the scope of Respondents' liability, and the Youth requested relief is consistent with the judiciary's broad authority to "fashion practical remedies when confronted with complex and intractable constitutional violations." *Brown*, 563 U.S. at 526; *McCleary*, 173 Wn.2d at 541 ("What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education."). The Court can, and must, provide a remedy in this case.

5. The APA Does Not Displace the Youth's Claims

Notwithstanding RCW 34.05.510, the Youth's constitutional claims against Respondent state agencies are not displaced by the APA, RCW

[28] Respondents did not challenge the Superior Court's authority to issue the injunctive relief requested in paragraphs (F) and (G) of Plaintiffs' Request for Relief. CP 71-72.

34.05.[29] The Youth do not seek review of individual agency actions. They challenge Respondents' *systemic* conduct in creating, controlling, operating, and maintaining the state's fossil fuel-based energy and transportation system, thereby causing and contributing to climate change in violation of the Youth's constitutional rights. No case holds that such a challenge must be brought under the APA. To the contrary, constitutional challenges of this nature to systemic government conduct have rightfully proceeded outside of the APA in other contexts. *See, e.g.*, *Braam ex rel. Braam*, 150 Wn.2d 689 (broad-based, non-APA case against Washington agency by foster children to protect their constitutional rights). In *Wash. State Coal. for the Homeless v. Wash. State Dep't of Social & Health Serv.*, this Court ruled that "[w]here . . . the plaintiffs are a class of children who are or will be affected . . . the most efficient and consistent resolution on the

[29] Respondents implicitly conceded that their APA arguments do not apply to the State and Governor. CP 135. The State and Governor are explicitly excluded from the APA; constitutional claims against them can only proceed under the UDJA. RCW 34.05.010(2). However, Respondents argued that the Governor should be dismissed as a Defendant because the claims against him are a collateral attack on agency action or inaction. This mischaracterizes the nature of the Youth's legal claims and ignores the allegations in the Complaint regarding the Governor's unconstitutional conduct. CP 18-19, ¶¶ 33–34, CP 43-44, ¶ 121, CP 45, ¶ 128, CP ¶ 46, 131, CP 47-48, ¶¶ 137-38. Respondents essentially argue the Governor is beyond constitutional command; such a position is contrary to law. *Cf. Clinton v. Jones*, 520 U.S. 681, 683 (1997) ("when the President takes official action, the Court has the authority to determine whether he has acted within the law."). Above and beyond his authority as head of the executive branch, the Governor plays a key role in formulating the state's energy and transportation policy that is injuring Plaintiffs. *See, e.g.*, Wash. Const. Art 3, § 5; RCW 43.21F.045(d); CP 18-19, ¶ 34, CP 47-48 ¶ 137. Respondent Inslee's unconstitutional actions can and should be subject to judicial review.

question is through a declaratory action, rather than a case-by-case, appeal-by-appeal basis in individual . . . proceedings." 133 Wn.2d 894, 916–17, 949 P.2d 1291 (1997). In so ruling, the majority rejected the dissenting opinion's position that "the APA provides the exclusive means of judicial review." *Id.* at 947 (Durham, C.J., dissenting).

When challenging agency action[30] under the APA, a petitioner can argue that an individual agency action violates constitutional provisions. RCW 34.05.570(2)(c) (final rules); RCW 34.05.570(3)(a) (agency orders in adjudicative proceedings); RCW 34.05.570(4)(c)(i) (other agency action). However, given the circumstances of this case, where it is Respondents' systemic actions continuing over several decades that harm these young children and threaten their fundamental rights, application of RCW 34.05.510, limiting the Youth's claims to the strictures of the APA, would violate their procedural due process right to meaningful review of their constitutional claims. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) (statutory limited review procedures did not apply where they would foreclose "meaningful judicial review" of challenge to agency's pattern of unconstitutional conduct); *Webster v. Doe*, 486 U.S. 592, 603

[30] Some of Respondents' unconstitutional acts are not "agency actions" subject to the APA. "Agency action" does not include "any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests." RCW 34.05.010.

(1988) (interpreting federal APA to deny "any forum for a colorable constitutional claim" would "raise serious constitutional questions").

Determining whether procedural limitations, like those governing review of agency conduct in the APA,[31] effectuate a violation of due process, requires consideration of three factors: "(1) the potentially affected interest; (2) the risk of erroneous deprivation of that interest through the challenged procedures, and probable value of additional safeguards; and (3) the government's interest, including the potential burden of additional procedures." *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004). Each of these factors favors the Youth.

First, the private interest at stake here is unquestionably of the highest constitutional importance because the Youth allege infringement of their fundamental rights. *Second*, there is an absolute risk of erroneous deprivation of the Youth's fundamental rights if they must plead their claims under and subject to the strictures of the APA. It is the systemic nature of Respondents' conduct and affirmative aggregate actions in creating, controlling, operating, and maintaining the state's fossil fuel energy and transportation system, that is causing the profound harms and

[31] *See, e.g.*, RCW 34.05.534 (exhaustion of administrative remedies required for each agency action); RCW 34.05.566 (limitation of review to record for individual agency action); RCW 34.05.542 (petition for judicial review of agency action must be filed within thirty days).

constitutional violations befalling the Youth. To force these Youth to individually challenge each of the myriad agency actions that have contributed to their injuries, within 30-day time frames, would be a herculean, if not impossible, task. Further, the limitation of review of each agency action to the agency record would foreclose consideration, review, and redress of the systemic nature of the constitutional violations at issue here as well as the severity of the harm. *See McNary*, 498 U.S. at 496 (limiting review of agency's pattern of unconstitutional violations to administrative records would preclude meaningful review). Moreover, many of the discriminatory agency actions comprising Respondents' systemic constitutional violations were committed decades ago, before these Youth were born and could even attempt to comply with the APA's deadlines for seeking review. *Amunrud*, 158 Wn.2d at 217 (procedural safeguards must be offered "at a meaningful time and in a meaningful manner."). To preclude review of these Youth's constitutional claims under the UDJA would not only risk erroneous deprivation of their rights; it would render such deprivation inevitable. *Downey v. Pierce County*, 165 Wn. App. 152, n.9, 267 P.3d 445 (2011) (case properly under UDJA because plaintiff "does not appear to have any other adequate remedy available to her . . . ."). *Third*, the government's interest in administrative efficiency favors litigating the Youth's claims as a single systemic challenge rather than a

myriad of challenges to a multitude of individual agency actions, which would undoubtedly prove costly, inefficient, and unduly burdensome for all parties involved.

It is unimaginable in our divided structure of government that Respondents' systemic and catastrophic constitutional violations could be placed beyond the Court's basic power and duty to safeguard fundamental rights. The very premise that *constitutional* claims could be precluded by *statute* runs contrary to the primacy of the constitution in the hierarchy of legal authorities. While RCW 34.05.510 may permissibly channel constitutional challenges to individual, discrete agency actions through the APA and it's strictures, its application in these unique circumstances would violate these Youth's procedural due process rights.

VI. CONCLUSION

For the reasons set forth above, the Youth respectfully request that this Court reverse the Superior Court's erroneous dismissal of their Complaint.

Respectfully submitted this 22nd day of January, 2019.

s/ Andrea K. Rodgers
Andrea K. Rodgers, WSBA #38683
Law Offices of Andrea K. Rodgers
3026 NW Esplanade
Seattle, WA 98117
T: (206) 696-2851
andrearodgers42@gmail.com

Andrew L. Welle, *Pro Hac Vice*
Law Offices of Andrew L. Welle
1216 Lincoln Street
Eugene, OR 97401
T: (574) 315-5565
andrew.welle@gmail.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2019, I served one true and correct copy of the foregoing on the following individuals using electronic mail in accordance with the parties' electronic service agreement:

ECYOLYEF@ATG.WA.GOV
AHDOLYEF@ATG.WA.GOV
TPCEF@ATG.WA.GOV

Christopher Reitz
Laura J. Watson
Assistant Attorneys General
Attorneys for Defendants State of Washington, Governor Jay Inslee, Department of Ecology, Director of Maia Bellon
chris.reitz@atg.wa.gov
laura.watson@atg.wa.gov
danielle.french@atg.wa.gov
leslieh2@atg.wa.gov

Matthew D. Huot
Assistant Attorney General
Attorney for Defendants Washington State Dep't of Transportation, Washington State Transportation Ecology Comm'n, WSDOT Sec. Roger Millar
matth4@atg.wa.gov
roberth3@atg.wa.gov
brendac1@atg.wa.gov

Sandra C. Adix
Assistant Attorney General
Attorney for the State of Washington Department of Commerce, Director of Commerce Brian Bonlender
(360) 664-4965
sandraa@atg.wa.gov

s/ Andrea K. Rodgers
Andrea K. Rodgers

_____
Andrew L. Welle (Pro Hac Vice)

Attorneys for Plaintiffs

LAW OFFICES OF ANDREA K. RODGERS

January 22, 2019 - 3:58 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	A. Piper, et al v. State of Washington, et al
Superior Court Case Number:	18-2-04448-1

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Address:
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